

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**YENKIN-MAJESTIC PAINT
CORPORATION,**

Respondent.

**Docket No. FMCSA-2007-27809¹
(Midwestern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. *Background*

On July 1, 2005, the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) against Yenkin-Majestic Paint Corporation (Respondent).² The NOC, which was based on a package inspection conducted on March 21, 2002, at the Columbus, Ohio terminal of Overnight Transportation Company, alleged one violation of 49 CFR 173.25(a)(2)—failing to properly mark and/or label an overpack, as required.³ During this inspection, FMCSA Special Agent/Safety Investigator Stephen J. McCormick allegedly found overpacks of a material, identified as a Class 3 material on

¹ The prior case number was OH-2002-0130-US0870.

² Although the Combined Motion for Final Order and Memorandum in Support filed by the Field Administrator for the FMCSA's Midwestern Service Center (Claimant) purports to attach the NOC as Exhibit C, no such exhibit was submitted for the record. Consequently, the description of the NOC is based on the discussion of the document in the Motion for Final Order.

³ An overpack, as defined in 49 CFR 171.8, is an enclosure used by a consignor of hazardous materials to provide protection or convenience in handling a package or consolidating two or more packages. Examples of overpacks include packages placed on a pallet and secured by strapping, shrink wrapping, stretch wrapping, or other suitable means.

shipping papers, to have no visible markings of a proper shipping name, and an obscured class 3 label for the hazardous material, which was identified on the shipping papers as “paint related materials, 3, UN 1263, II.”⁴ The NOC proposed a civil penalty of \$1,900 for the alleged violation.⁵

According to Claimant, Respondent timely replied to the NOC on July 25, 2005, denying the violation and requesting a hearing.⁶ In his Motion for Final Order served April 5, 2007, Claimant argued that the McCormick Declaration establishes that the proper shipping name was not visible anywhere on the overpack and the Class 3 label was partially obscured. The shipping paper identified the product as “Klean Strip VM&P Naptha” shipped as “paint-related material, 3, UN 1263, II,” a Class 3 hazardous material. Attached to the McCormick Declaration are photographs purporting to show that the single exposed side of the Naptha box displays no visible Class 3 label and that only the top half of the label bearing the proper shipping name is visible, as the bottom is blocked by other boxes. Claimant cites the affidavit of Jim McGurer, an employee of Respondent, as an admission that the label with the proper shipping name was on the side of the carton, rather than on the top or bottom.⁷ Claimant argued that: (1) Respondent’s

⁴ Declaration of Stephen J. McCormick (McCormick Declaration), Exhibit A to Motion for Final Order.

⁵ According to Claimant, the July 1, 2005, NOC amended an NOC issued on May 6, 2002, that proposed a \$4,200 civil penalty for the same violation. The first NOC was revised to recalculate the civil penalty in response to certain decisions of the Assistant Administrator issued in March 2005.

⁶ Although Respondent’s reply was purportedly attached as Exhibit D to the Motion for Final Order, no such exhibit appears in the docket.

⁷ This affidavit was allegedly attached to Respondent’s reply to the NOC and, like the reply, does not appear in the docket.

reply does not support its denial of the violation or rebut Claimant's evidence; and (2) the proposed civil penalty was properly calculated in accordance with FMCSA's Uniform Fine Assessment algorithm to induce further compliance with the regulations.

Respondent served a response to the Motion for Final Order on May 11, 2007. Respondent raised the issue of whether the photographs attached to the McCormick Declaration depict an intact pallet as packed by Respondent, since the pallet could have been broken down and re-packed following receipt by the carrier. Respondent further argued that it substantially complied with the regulatory requirements because: (1) the markings that were visible indicated the appropriate hazard class; and (2) the overpack indicated that the packages contained VM&P Naptha,⁸ which is more descriptive than "paint-related material", making the code number "UN 1263" unnecessary. Respondent also contended that inclusion of the UN code on the packing slip appended to the overpack would satisfy the regulatory requirements and there is an issue of fact regarding whether the visible portion of the packing slip contained this information. Respondent also claimed it was unfairly prejudiced by the 5-year lapse between the discovery of the violation and the filing of the Motion for Final Order and challenged the calculation of the proposed civil penalty as "fatally flawed" because, among other things, it failed to properly take into account the "extent" factor and does not permit imposition of the minimum fine prescribed by statute. Finally, Respondent argued that Claimant mischaracterized the McGurer affidavit, which Respondent claims supports its argument that no violation occurred.

⁸ The letters VM&P is an abbreviation of the phrase "varnish maker's and painter's".

2. Decision

A motion for final order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.⁹ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Claimant must establish a *prima facie* case; in other words, he must present evidence clearly establishing all essential elements of his claim.¹⁰ If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.¹¹

Respondent's response to Claimant's Motion for Final Order raises several issues of material fact that would be best resolved by granting its request for a formal hearing. These issues include whether the photographs offered by Claimant accurately depict the condition of the pallet when presented to the carrier by Respondent and whether sufficient information was visible to comply with the applicable regulatory requirements.¹² Moreover, the dispute over the meaning of the McGurer affidavit cannot be resolved based on the current record because that document does not appear in the docket. Therefore, Claimant's Motion for a Final Order is denied and Respondent's request for a formal hearing is granted.

⁹ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, March 31, 1993 (Order, December 5, 1991).

¹⁰ *Id.*

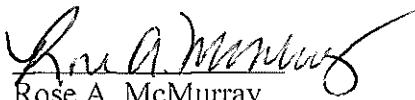
¹¹ *Id.*

¹² The clarity of the photographs, as scanned into the docket, leaves much to be desired—another reason why this matter would benefit by having the originals, or more legible copies, scrutinized by an administrative law judge at a formal hearing.

3. Appointment of Administrative Law Judge

In accordance with 49 CFR 386.54, an administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter and render a decision on all issues. The proceeding shall be governed by Subparts D and E of the Agency's Rules of Practice,¹³ and all orders issued by the administrative law judge.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4-3-05
Date

¹³ FMCSA revised its Rules of Practice, effective November 14, 2005. The former Rules of Practice apply to matters, such as this one, in which a Notice of Claim was served before the effective date. 70 Fed. Reg. 28647, 28648 (May 18, 2005).

CERTIFICATE OF SERVICE

This is to certify that on this 7th day of April, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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